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No. _____

In The
Supreme Court of the United States
October Term, 1983

SAMUEL P. GARRISON, etc.,
Petitioners,

vs.

GEORGE SMITH ALSTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. What is the proper formulation for describing effecfective assistance of counsel; and under it, does missing an objection which might have won a new trial on appeal constitute ineffectiveness?

2. Has actual and substantial prejudice been shown where an incriminating piece of evidence, wrongly admitted, is fit in to the defendant's version of the facts and explained by him?

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In The
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vs.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Samuel P. Garrison, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in the case of *Alston v. Garrison*, 720 F.2d 812 (4th Cir. 1983) reversing *Alston v. Garrison*, No. 81-0049-HC, unpublished (EDNC, February 4, 1982).

OPINION BELOW

The opinion of the United States Court of Appeals is reported as set out above and a copy of it is attached as Appendix A to this petition (App. 1). The District Court opinion is attached as Appendix C (App. 16).

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC §1254(1) within ninety days of the date of the Court of Appeals' decision: November 3, 1983.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Assistance of Counsel Clause of the Sixth Amendment which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

George Alston was convicted at the August 15, 1977 Criminal Session for Cumberland County, Honorable D. Marsh McLelland, Judge Presiding, in case numbers 76 CRS 46757, 46758, and 46759 in which he was charged

with kidnapping, armed robbery and felonious assault, respectively, after jury trial at which he both testified and offered other evidence. He was sentenced to concurrent life sentences for kidnapping and armed robbery and a consecutive sentence of 20 years for assault. The North Carolina Supreme Court affirmed his conviction on 17 April 1978, *State v. Alston*, 294 NC 577. At trial and on appeal, petitioner was represented by court-appointed counsel, James M. Cooper, Esquire, from the Cumberland County Bar. He exhausted his state remedies on the issues now before this Court by an application for post-conviction relief filed on his behalf by the staff of the University of North Carolina Law School on 12 March 1979 which was denied on 16 March 1979 by Judge McLelland without a hearing with the North Carolina Supreme Court denying certiorari on 18 July 1979. His lawyers then applied for relief from the United States District Court for the Eastern District of North Carolina but were denied same without a hearing by order of Honorable John D. Larkins, as previously reported in the opening paragraph to this petition. The United States Court of Appeals for the Fourth Circuit reversed Judge Larkins on November 3, 1983, directing that the writ issue on Mr. Alston's behalf.

STATEMENT OF FACTS

George Alston was convicted at a trial in which the state elicited a response from an investigating officer that after the officer had advised Alston of his constitutional rights, the latter started to converse but then

stopped and stated he wanted a lawyer. On cross-examination, the officer reiterated this on two occasions. No objection or motion to strike was made on any of these occasions. Additionally, Mr. Alston's trial lawyer had evidently stated to the officers conducting the lineup at which his client was identified that the lineup was "a mighty fine" one with this also coming out in evidence and being unobjected to. The trial lawyer also represented petitioner on appeal and did not assign these matters as error there. They were the subject of Alston's post-conviction motion in state court and habeas corpus application in federal court with the State asserting initially that its contemporaneous objection rule prevented review of these matters *per se* and that if approached from the standpoint of ineffective assistance of counsel, non-objection to two matters would not constitute ineffectiveness, at least under the circumstances of this case where the evidence against petitioner, while in conflict and not wholly one way or the other, did contain strong evidence of petitioner's guilt. The Fourth Circuit rejected this argument.

REASONS FOR GRANTING THE WRIT

I.

There is a conflict in the Circuits as to the description of effective assistance of counsel which this Honorable Court should resolve.

George Alston was convicted following two mistrials in a case where the evidence conflicted. The State's case, at least on paper, was fairly strong, but not so overwhelming that it would make any given evidentiary mat-

ter harmless error. During trial, his lawyer did not object to a reference to petitioner having stopped after being warned of his rights and went on to elicit other such references himself; and did not object to evidence that he had stated the line up in which Alston was identified was a good one. The Fourth Circuit found this to be ineffective assistance of counsel under its standard that representation must be within the range of competence expected of criminal law practitioners and that any failure to object must be the result of informed, professional deliberation rather than ignorance or mistake. *Marzullo v. Maryland*, 561 F.2d 540 (4th Cir. 1977). No evidentiary hearing had ever been held on this matter and the Fourth Circuit inferred that the non-objections were due to ignorance, although it is possible to infer that counsel felt the first of these unimportant since he evidently intended to have his client explain his arrest, including his assertion of silence, his evidence in this regard generally being that he was roughed up, but never asked to make a statement. The second was apparently admissible evidence, being an admission by an agent.

The Fourth Circuit's formulation for effective assistance of counsel on evidentiary matters is one of several in the Circuits. Others include a lawyer reasonably likely to render and rendering reasonably effective assistance of counsel, *MacKenna v. Ellis*, 280 F.2d 529 (5th Cir. 1960); *United States v. Goodwin*, 531 F.2d 347 (6th Cir. 1976); *United States v. DeCoster*, 487 F.2d 1197 (DC Cir. 1973); *Cooper v. Fitzharris*, 551 F.2d 1162 (9th Cir. 1977); a lawyer having the customary skill and knowledge prevailing in the area, *Moore v. United States*, 432 F.2d 730 (3rd Cir. 1970); *Wallace v. Lockhart*, 701 F.2d 719 (8th Cir. 1983); a lawyer meeting minimum standards of pro-

fessional representation, *United States ex rel Williams v. Twomey*, 510 F.2d 634 (7th Cir. 1975); a lawyer whose conduct does not amount to a farce and mockery, *Rickenbacker v. Warden*, 550 F.2d 621 (2nd Cir. 1976); compare *Barnes v. Jones*, 665 F.2d 427 (2nd Cir. 1981)[1]; and a lawyer providing reasonably competent assistance, *Cepulonis v. Ponte*, 699 F.2d 573 (1st Cir. 1983) (which is evidently determined by the Fourth Circuit ignorance/neglect v. informed, professional decision measurement); *Dyer v. Crisp*, 613 F.2d 275 (10th Cir. 1980) which, like *Rickenbacker*, provides a good summary of the various standards. Under at least three of them, missing objections to important matters at trial has not been held to constitute ineffectiveness, *United States v. Robinson*, 502 F.2d 894 (7th Cir. 1974); *United States v. Valenzuela*, 521 F. 2d 414 (8th Cir. 1975); *McDonald v. Estelle*, 536 F.2d 667 (5th Cir. 1976), although there is a conflict between the circuits under the "customary skill" standard, see *Boyer v. Patton*, 579 F.2d 284 (3rd Cir. 1978).

The standards which permit representation to be described as effective despite the missing of an important objection are the appropriate ones and this Honorable Court should seize this opportunity to make this plain. Resolution of this matter would definitely favor the state in Mr. Alston's case because overall, he got very good representation which included the following: (i) hanging the jury twice; (ii) conducting lengthy cross-examination of the victim and the investigating officer; (iii) strongly attacking the identification of Alston and of the car he supposedly used; (iv) introducing evidence of an alibi

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[1]This has been changed to the First Circuit's standard by *Trapnell v. United States*, — F.2d —, 34 Cr.L. 2274 (2nd Cir. 1984).

through six witnesses; and (v) making an argument on appeal which required a 20 page opinion by the North Carolina Supreme Court to reject.

II.

The decision in United States v. Frady, 456 US 152 (1983) indicates that the Fourth Circuit's decision on prejudice to excuse forfeiture was wrong, in that the evidence complained of was fit into petitioner's version and explained by him.

In addition to presenting the matter of the standard of ineffectiveness for review, the context in which this arises also provides a basis for further amplification of the *United States v. Frady*, 456 US 152 (1982) standard for actual prejudice. The ineffectiveness found in this case was used as cause to excuse forfeiture under *Wainwright v. Sykes*, 433 US 72 (1977), and to do so it must be accompanied by actual and substantial prejudice. *Frady* tends to show there was none here. It held that because Frady claimed an alibi, he was not actually and substantially prejudiced by a jury instruction which eased the government's burden of proof on its theory of the case. A parallel exists here. Even if Alston's right to self-incrimination was violated by the officer's testimony of his post-arrest silence, he waived this right at trial and explained his pretrial silence in a different way, one which fit in with his version of the interrogation.

CONCLUSION

It is respectively argued that because of the above, a writ of certiorari should issue to review and reverse the decision of the Court of Appeals.[1]

Submitted as the petition for writ of certiorari on behalf of Samuel P. Garrison, this 1st day of February, 1984.

Respectfully submitted,

RUFUS L. EDMISTEN
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[1]The Court should be aware in reviewing this case that the record does not contain the evidence from the two mistrials but only the trial at which Mr. Alston was finally convicted. Therefore, whether the evidence involved in the writ was used in the prior trials is not known, nor is it known whether new evidence was added at the third trial. Should the Court desire to take this case contingent on the availability of such transcripts, the undersigned will attempt to obtain them for judicial notice pursuant to FRE 201.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-6799

George Smith Alston,

Appellant,

v.

Samuel P. Garrison,
Rufus Edmisten, Attorney
General of N. C.,

Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. John D. Larkins, Jr., Senior District Judge. C/A 81-0049-HC

Argued: April 13, 1983 Decided: November 3, 1983

Before MURNAGHAN, SPROUSE, and ERVIN, Circuit Judges.

Michael T. Medford (Manning, Fulton & Skinner on brief) for Appellant; Richard N. League, Special Deputy Attorney General (Rufus L. Edmisten, Attorney General of North Carolina on brief) for Appellee.

ERVIN, Circuit Judge:

George Smith Alston appeals from the denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254.

He chiefly argues that his trial counsel's failure to object to prosecution evidence that he "stood on his constitutional rights" to remain silent denied him the effective assistance of counsel in violation of the sixth and fourteenth amendments, to a degree that prejudiced the outcome of his trial. We agree and reverse the judgment of the district court, directing the issuance of a writ of habeas corpus conditional on the results of a new trial.

I.

Around midday on December 30, 1976, James DeLay, who was traveling on foot in the vicinity of Spring Lake, North Carolina, accepted a ride from a stranger. This individual took DeLay to a secluded area in rural Cumberland County, held him at gun point, and ordered him to write a check for $250.00 payable to the order of a name which the assailant supplied. The assailant then fired twice at DeLay, wounding him in the back with the second shot.

Next in this strange chain of events, the assailant ordered DeLay to get up and walk through the woods. When they stopped to rest, DeLay suggested that a check made out to "cash", rather than a person's name, would be processed more quickly at the bank. The assailant agreed, and DeLay wrote out a check for $265.00 payable to cash. The first check was destroyed.

The assailant and DeLay then drove to a branch of the Cape Fear Bank in Fayetteville, and DeLay's check was cashed at a drive-in window. Afterwards the assailant drove DeLay back to Spring Lake and released him.

Later that evening, George Alston was arrested and charged with armed robbery, kidnapping, and assault with intent to kill inflicting serious injury.

II.

Alston was tried three times, with the first two trials ending in hung juries. At each trial, the State introduced the following evidence tending to show that Alston was DeLay's assailant:

1. Alston was arrested in a car similar to that described by DeLay as the vehicle of his assailant. Alston's car was a white 1973 Pontiac Grand Prix with a white vinyl roof compared with DeLay's description of a white Monte Carlo, Buick or Grand Prix with a red landau roof.

2. At the time of his arrest, Alston had in his possession a .32 caliber pistol containing six rounds of ammunition.

3. On January 5, 1977, DeLay selected the name George Alston from a police-prepared list of four names, Johnson, Alston, Alton and Alman, all preceded by the name George, as the name he wrote on the first check.

4. Also on January 5, 1977, DeLay selected a photograph of Alston out of a display of six photographs as that of his assailant.

5. On January 22, 1977, DeLay picked Alston out of a line-up consisting of six black males between the ages of 20 and 25, all approximately six feet tall and of medium build, characteristics which matched DeLay's description of his assailant.

6. The bank teller at the drive-in window of the Cape Fear Bank indicated that Alston's picture looked familiar when it was shown to her along with other photographs.

7. Ballistics evidence indicated that a bullet removed from DeLay's back had been fired by the .32 caliber weapon in Alston's possession at the time of his arrest.

The following evidence, however, tended to show that Alston was not DeLay's assailant:

1. Alston's car was white with a white top, while DeLay's description of his assailant's car referred to a red top.

2. At the time of his arrest, Alston was accompanied by three black males and a black female, and the vehicle which he was driving when arrested was registered in the name of David Gaylor, one of the passengers in the car.

3. Although DeLay testified that he wiped blood from his wound onto the seats of the car in which he was abducted, no blood was found by police in the car in which Alston was arrested. Additionally, Detective Burns, who was in charge of the investigation, testified that the vehicle had not been dusted for fingerprints to determine whether DeLay's fingerprints were in the car. (At an earlier trial, he erroneously testified that the car had been dusted for fingerprints.)

4. When DeLay first reported the crime to authorities, he was unable to recall the name which the assailant had directed him to write on the first check. When he attempted to spell the first name as "G-E-O-G", an agent

for the Army Criminal Investigation Division suggested "George", and DeLay agreed that it sounded familiar. With respect to the last name, DeLay told the agent that "Johnson" sounded familiar. It was only after the arrest of Alston that Agent Atkinson wrote out four names, Johnston, Alston, Alton and Alman, all preceded by the name George, from which DeLay selected the name George Alston.

5. Prior to the January 5, 1977 photographic identification, DeLay was shown another series of photographs containing a photograph of Alston but was unable to identify any of the individuals as his assailant.

6. There was evidence from which the jury might have found that DeLay had seen Alston in the courtroom on January 19, 1977, thus tainting his identification of the petitioner at the line-up three days later.

7. The bank teller testified that her attention during the check cashing was directed at DeLay, and that she could not positively identify the individual who was with him at the time.

8. While there was evidence that DeLay's assailant handled the check cashed at the Cape Fear Bank, no fingerprints of Alston were found on the check, although fingerprints belonging to DeLay and other unidentified individuals were found.

9. Testifying in his own behalf, Alston stated that he visited a neighbor, Linda Rhue, at her trailer from approximately 12:30 P.M. to 3:30 P.M. on December 30, 1977, the time of the crime. This was corroborated by Rhue.

10. Alston testified that he had left his gun at home while visiting Rhue. When he returned home and prepared to go out for the evening he took the gun and put it in his pocket because he planned to visit some rough local night clubs.

III.

During Alston's third trial, the State introduced evidence that at the time of his arrest Alston declined to answer questions after being informed of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966).[1] The following exchange took place between the prosecutor and Detective Burns:

> Q: After advising him of his constitutional rights did you talk with him at all?
>
> A: Well, sir, he stood on his constitutional rights.
>
> Q: In other words, he didn't say anything to you at that time, did he?
>
> A: He started to converse, sir, and then he just shut up and he said I want my lawyer and we abided by his wishes.

Defense counsel did not object to the admission of this evidence. In cross-examination of Detective Burns, Alston's lawyer asked what had prompted the police to designate Alston as the chief suspect in the case. Burns gave four reasons:

> Up until this point the facts that we had uncovered were that (1) Mr. Alston fitted the description physically of the person who had robbed, kidnapped

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[1]Neither party presently recalls whether similar evidence was admitted at Alston's first two trials.

> and shot Mr. DeLay; (2) he was operating a vehicle that fitted the description of the car that was utilized in the commission of the crime; (3) he was stopped on the military reservation of Fort Bragg [where] he had in his possession a weapon, a .32 caliber pistol with six rounds of .32 ball ammunition in it; and (4) *he did not give any statement concerning—I would say his activities on the date of the 30th of December, 1976. As I stated, he stood on his constitutional rights.* (emphasis added)

A bit later in the cross-examination, Burns described his encounter with Alston following the latter's arrest.

> Mr. Alston started to talk after I read him his constitutional rights, and then he stood on his rights. He shut up. He said I want a lawyer. Right away. I respected his wishes.

Alston's lawyer made no attempt to have this testimony stricken and to obtain a curative instruction from the court to the jury.

The jury returned a verdict of guilty, and Alston was sentenced to life plus twenty years imprisonment. Alston's trial counsel took an appeal to the North Carolina Supreme Court which was denied. Alston then filed, *pro se*, a petition for state habeas corpus relief in Cumberland County Superior Court, claiming ineffective assistance of counsel in contravention of the sixth and fourteenth amendments to the United States Constitution. After that petition was denied, he filed a Motion for Appropriate Relief, which was dismissed without an evidentiary hearing on March 16, 1979. The North Carolina Court of Appeals affirmed and the North Carolina Supreme Court denied certiorari on June 18, 1979.

Alston began his pursuit of federal habeas relief on January 22, 1981, filing a petition under 22 U.S.C. § 2254

in the federal district court for the Eastern District of North Carolina. On October 28, 1981, the court granted the State's motion to dismiss, denying Alston's petition on the ground that he had failed properly to raise his claims at trial, on direct appeal from his conviction, and in his post trial motions in the North Carolina courts, and that he was thus barred from any relief in federal court under 22 U.S.C. § 2254 for failure to exhaust state remedies. After Alston informed the court that he had in fact raised the claims contained in his federal habeas petition in his state court Motion for Appropriate Relief, the district court entered a new order holding that Alston was denied the effective assistance of counsel,[2] but that in light of all the evidence, the constitutional error was harmless. The writ was, therefore, denied.

IV.

Under *Wainwright v. Sykes*, 433 U.S. 72 (1977), and *Cole v. Stevenson*, 620 F.2d 1055 (4th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1004 (1980), a state rule requiring contemporaneous objection at trial to alleged errors of law bars federal habeas review of issues that were not objected to or appealed in state proceedings. Only if the petitioner for federal habeas relief can show good cause for failing to raise the issue in the state proceedings and

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[2]The district court was not troubled by the fact that Alston had not complied with North Carolina's contemporaneous objcetion rule on his sixth amendment claim, reasoning that "[a] finding of ineffective assistance of counsel sufficiently demonstrates 'cause' [for nonobjection] and 'prejudice' [resulting from the constitutional violation] and will allow the court to address issues affected by this claim on their motion." *See Wainwright v. Sykes*, 433 U.S. 72 (1977).

actual prejudice to the outcome of the trial can he or she obtain federal review of constitutional claims. In this case, the claim of ineffective assistance of counsel obviously was not raised by Alston's counsel, either at trial or on appeal. Therefore, Alston seeks to place himself within the cause and prejudice exception to *Wainwright*. He offers as cause for failing to raise the issue below the fact that Alston's trial counsel continued to represent him through his unsuccessful direct appeal to the North Carolina Supreme Court and could hardly have been expected to assert his own incompetence.

We are satisfied with Alston's excuse for failing to raise his ineffectiveness claim at trial and on state appeal. The content of an appeal is heavily controlled by counsel, and where, as here, the defendant's trial lawyer also prosecuted the appeal, it is obvious that ineffective assistance of counsel is not likely to be raised at trial or to appear among the assignments of constitutional error. *Cf. Towndrow v. Henderson*, 692 F.2d 262 (2nd Cir. 1982) (where defendant was represented by ***new*** counsel on direct appeal, failure to assert sixth amendment claim invoked the *Wainwright* bar to federal review); *United States ex rel. Caruso v. Zelinsky*, 689 F.2d 435 (3rd Cir. 1982) (where state rule required collateral claims to be raised within five years of conviction, *Wainwright* bar applied to federal habeas petitioner who did not assert ineffectiveness claim until more than five years after conviction).

We also believe that trial counsel's [undisputed] incompetence worked to Alston's actual and substantial prejudice, infecting the entire trial. *See United States v. Frady*, 456 U.S. 152 (1982). Few mistakes by criminal defense counsel are so grave as the failure to protest evi-

dence that the defendant exercised his right to remain silent. *See Doyle v. Ohio*, 426 U.S. 610 (1976); *Williams v. Zahradnick*, 632 F.2d 353 (4th Cir. 1980). Such evidence plants in the mind of the jury the dark suspicion that the defendant had something to hide, and that any alibi which is subsequently proffered is pure fabrication. The Supreme Court best stated these concerns in *Doyle v. Ohio*, 426 U.S. 610 (1976), holding that comment on a defendant's post-arrest silence violated due process of law:

> The warnings mandated by [*Miranda v. Arizona*, 384 U.S. 436 (1966),] as a prophylactic means of safeguarding Fifth Amendment rights . . . require that a person taken into custody be advised immediately that he has the right to remain silent, that anything he says may be used against him, and that he has a right to retained or appointed counsel before submitting to interrogation. Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these Miranda rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested . . . . Moreover, while it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.

Id. at 617-18 (citations and footnotes omitted). In the present case, defense counsel permitted evidence of Alston's silence to come in not once, but on three separate occasions. Alston's defense of alibi stood faint hope of impressing the jury under these circumstances, so in our opinion, the petitioner has adequately demonstrated the

existence of prejudice flowing from his counsel's incompetence, as required under the cause and prejudice caveat to *Wainwright v. Sykes.*

V.

We turn next to the merits of Alston's constitutional claim. There can be no doubt, as indeed the district court held, that the representation rendered by Alston's court-appointed attorney grossly violated the defendant's sixth amendment rights. Since 1976, when *Doyle v. Ohio* was decided, the law has been clear that admitted evidence of post-arrest silence violates due process of law. Failure to oppose the admission of such evidence plainly falls beneath the "range of competence demanded of attorneys in criminal cases." *Marzullo v. Maryland,* 561 F.2d 540, 543 (4th Cir. 1977), *cert. denied,* 435 U.S. 1011 (1978).[3]

Next we must decide on the record before us whether the constitutional error was harmless. *See Chapman v.*

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[3]Further evidence of counsel's incompetence is seen in the failure to object to testimony by Detective Burns that counsel congratulated police on the quality of the line-up out of which Alston was picked as the assailant:

> Q. Did [appointed defense counsel] tell you anything about the line-up?
>
> A. He said that was a mighty fine line-up. He said that was the best one he had ever saw—I don't remember if he said it was the best one he ever saw but he said it was a very good line-up.

While Alston's counsel had no business making such a statement in the first place, the real damage resulted from his failure to object when the statement was presented at trial. By this evidence, counsel appeared to vouch for the accuracy of the line-up which inculpated his client. The very essence of the adversarial system is violated by a performance such as this one by counsel.

California, 386 U.S. 18 (1967). In the recent case of *United States v. Hasting*, — U.S. —, 76 L.Ed.2d 96, 103 S.Ct. (1983), the Supreme Court considered the harmless error doctrine where evidence was admitted that the defendants stood mute. The Court first noted that "a judgment may stand only when there is no reasonable possibility that the [practice] complained of might have contributed to the conviction.'" *Id.* 76 L.Ed.2d at 104, quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963). The Court then held that the propert inquiry was whether viewing the entire record it is clear beyond a reasonable doubt that the jury would have returned a verdict of guilty absent evidence of the defendant's silence. *Id.* 76 L.Ed. at 107. The *Hasting* Court answered that question affirmatively where victims of a communal rape promptly and positively identified the defendants in a police line-up; where neutral witnesses also saw the defendants escorting the women; and where the crime vehicle—a turquoise Cadillac—was a singular color and was registered to one of the defendants.

Here, in contrast, the evidence is not so airtight. While some of the evidence against Alston was indeed potent, especially the testimony that Alston had possession of the crime weapon, nagging gaps in the proof appear: the absence of the defendant's fingerprints on the check extorted from DeLay; the failure by authorities to dust for the victim's fingerprints in the alleged crime car; the absence of bloodstains in the car where the victim allegedly sat wounded; the registration of the car to someone other than Alston; DeLay's initial failure to pick Alston's face out of a mug book. This evidence provoked

enough doubts to result in hung juries the first two times Alston was tried.

Furthermore, "because the nature of a *Doyle* error is so egregious and so inherently prejudicial, reversal is the norm rather than the exception." *Williams v. Zahradnick*, 632 F.2d 353, 363 (4th Cir. 1980) (footnote omitted). In *Williams*, this court distilled five factors to be weighed in determining whether a *Doyle* error was harmless:

1. The use to which the prosecution puts the post-arrest silence.
2. Who elected to pursue the line of questioning.
3. The quantum of other evidence indicative of guilt.
4. The intensity and frequency of the reference.
5. The availability to the trial judge of an opportunity to grant a motion for mistrial or to give curative instructions.

Id. at 361-62 (footnotes omitted). As applied to the facts before us, we note that it was the prosecutor who first deliberately elicited evidence of Alston's silence, evidence which tended to undermine Alston's alibi defense. Later, on cross-examination, defense counsel managed twice to hand Detective Burns opportunities to point out that Alston "stood on his constitutional rights." No tactical maneuver can explain the failure of counsel to keep out this evidence. The quantum of other evidence indicative of guilt in our opinion "was not persuasive enough to tip the scale towards harmless error." *Williams v. Zahradnick*, 632 F.2d at 365. As to "the intensity and frequency of the reference," Detective Burns three times distinctly alluded to Alston's silence. And because Alston's lawyer failed to object or to move to strike, the trial judge was

never requested to give curative instructions. Nor did the trial judge give such instructions *sua sponte*. In short, we find reason to fear that the shortcomings of counsel infected the outcome of Alston's third trial, and for that reason, a writ of habeas corpus must issue, conditional on the results of a new trial.

We hold that the denial of effective representation of counsel to George Alston was not harmless error, and that therefore the judgment of the district court must be reversed.

REVERSED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
Filed Nov. 17, 1983

No. 82-6799

George Smith Alston,

Appellant,

versus

Samuel P. Garrison;
Rufus Edmisten, Attorney
General of N.C.,

Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh.

Upon consideration of a motion of the appellees, for stay of mandate pending application to the Supreme Court of the United States for a writ of certiorari,

IT IS ORDERED that the motion is DENIED.

For the Court—by Direction.

/s/ William K. Slate, II
Clerk

83 - 1318

No. .....

In The
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October Term, 1983

SAMUEL P. GARRISON, etc.,
Petitioners,

vs.

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Respondent.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA

RALEIGH DIVISION

No. 81-0049-HC

GEORGE SMITH ALSTON,

Petitioner

vs.

SAMUEL P. GARRISON, et al.,

Respondents

ORDER

(Filed February 4, 1982)

LARKINS, SENIOR DISTRICT JUDGE:

SUMMARY

THIS MATTER comes before this Court on petitioner's Motion for Relief from Judgment filed pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. Although respondents have failed to respond, this motion is ready for ruling.

After careful independent review of petitioner's motion with accompanying exhibits, and memorandum in support of his application for a writ of habeas corpus and respondents' answer and motion to dismiss, IT IS THE OPINION OF THIS COURT THAT PETITIONER'S MOTION BE GRANTED IN PART AND DENIED IN PART AND THAT THE OCTOBER 28, 1981 ORDER OF THIS COURT BE VACATED IN PART AND RETAINED IN PART; THAT HAVING CONSIDERED

THE MERITS OF PETITIONER'S CLAIMS, THE RESPONDENTS' MOTION TO DISMISS BE GRANTED AND PETITIONER'S APPLICATION FOR A WRIT OF HABEAS CORPUS BE DENIED AND HIS CASE DISMISSED.

FINDINGS OF FACT

Petitioner was convicted of assault with intent to kill inflicting serious injury, armed robbery and kidnapping on August 19, 1977. He was then sentenced to concurrent terms of life imprisonment for armed robbery and kidnapping and to a consecutive term of twenty years for assault with intent to kill inflicting serious injury.

On appeal, the North Carolina Supreme Court found no error. Subsequently, on March 14, 1979, petitioner filed a Motion for Appropriate Relief setting forth the allegations presented in this case, which was denied by the trial court on March 16, 1979. The North Carolina Court of Appeals denied certiorari and the North Carolina Supreme Court affirmed that denial on July 18, 1979.

Petitioner then sought habeas corpus relief in this Court. On October 28, 1981, this Court dismissed petitioner's claims on the ground that they had not been presented previously in the state courts of North Carolina and were procedurally barred from this Court. Because briefs for petitioner and respondents have been filed with regards to petitioner's application for a writ of habeas corpus, this Court will now entertain petitioner's Rule 60(b) motion and application for federal habeas relief.

CONCLUSIONS OF LAW

Petitioner correctly asserts that this Court incorrectly held that his claims (1), (2) and (3) in his application for a writ of habeas corpus were not asserted in his Motion for a writ of habeas corpus were not asserted in his Motion for Appropriate Relief filed March 14, 1979. The record reveals that those claims were in fact asserted in such a Motion. The record as of the October 28, 1981 Order, however, did not include petitioner's Motion for Appropriate Relief.

Petitioner also asserts that this Court erred in holding that he did not sufficiently demonstrate "cause" and "prejudice" to overcome the procedural default rule of *Wainwright v. Sykes*, 433 U.S. 72 (1977). Upon reconsideration, this Court holds that the petitioner did not show sufficient cause and prejudice to justify federal habeas relief.

A. *Jurisdiction.*

It is clear this Court retains jurisdiction to rule upon this motion. Although a final judgment has been entered and an appeal perfected by the filing of a notice of appeal, this Court retains jurisdiction to consider and deny a motion for relief from judgment. *Schattman v. Texas Employment Commission*, 330 F.Supp. 328 (W.D. Tex.), *rev'd on other grounds*, 459 F.2d 32, *cert. denied*, 409 U.S. 1107 (1971). This specific motion based on the ground of mistake can be made even though an appeal is pending. *Transit Cas. Co. v. Security Trust Co.*, 441 F.2d 788 (5th Cir.), *cert. denied*, 404 U.S. 883 (1971).

Although petitioner has given timely notice of appeal prior to the ruling of this Motion, this Court retains juris-

diction to entertain and rule upon such motion in a habeas corpus action. *Gray v. Estelle,* 574 F.2d 209 (5th Cir. 1978).

B. *Procedural default.*

This Court was incorrect in stating in its October 28, 1981 Order that petitioner did not assert his habeas claims in a Motion for Appropriate Relief. However, the Court is not convinced that federal habeas relief is warranted.

Claims (1) and (2) dealt with evidentiary matters which should have been objected to at trial and were not. Since they were not objected to at trial, they could not be asserted on appeal, N.C.R.A.P. 10(a),(b)(1), or in a Motion for Appropriate Relief. *State v. White,* 274 N.C. 220, 162 S.E.2d 473 (1968). These claims could have been entertained on the merits if cause and prejudice was shown as to why the errors were not objected to at trial or asserted on appeal. *Cole v. Stevenson,* 620 F.2d 1055 (4th Cir. 1980). Upon reconsideration, this Court affirms its earlier Order that petitioner failed to prove cause and prejudice, and, therefore, claims (1) and (2) are procedurally barred from review by this Court. *Wainwright v. Sykes, supra.*

If petitioner disagrees as to the Court's ruling on the cause and prejudice issue he should address such issue in his appeal of the original judgment. This rule providing for relief from a judgment on the ground of mistake is not available as a substitute for appeal. *Horace v. St. Louis Southwestern R. Co.,* 489 F.2d 632 (8th Cir. 1974). Petitioner's motion requesting relief from judgment on the cause and prejudice issue concerning claims (1) and (2) is denied. Since claims (1) and (2) were listed in

petitioner's Motion for Appropriate Relief, his motion to correct that portion of the October 28, 1981 Order is granted.

In that same Order, this Court also stated that petitioner's third claim—ineffective assistance om counsel—was not asserted in his Motion for Appropriate Relief. The record reveals, however, that this issue was listed in such a Motion. Therefore, petitioner's Motion for Relief from Judgment is granted as to that incorrect statement.

Petitioner claims that since this issue was raised in a Motion for Appropriate Relief, it is not procedurally barred from review by this Court. This Court agrees. For this reason, such issue will now be addressed on the merits.

A finding of ineffective assistance of counsel sufficiently demonstrates "cause" and "prejudice" and will allow the court to address issues affected by this claim on their merits. *See e.g., Jiminez v. Estelle,* 557 F.2d 506 (5th Cir. 1977). Such a finding in this case would allow all claims to be addressed on the merits. This Court, however, now holds that petitioner was not denied effective assistance of counsel sufficient to warrant federal habeas relief.

Petitioner alleges that he was denied effective assistance of counsel because: (1) his attorney failed to object to the admission of testimony that petitioner remained silent after his arrest and failed to assert this error on appeal; (2) his attorney failed to object to the admission of Sergeant Burns' testimony that petitioner's attorney made a favorable comment concerning a line-up and failed to assert such error on appeal; and (3) his attorney failed

to object to or raise on appeal evidence tending to show that he had a prior criminal record.

1. *Post arrest silence.*

The test as to whether petitioner has received effective assistance of counsel is whether counsel's performance "was within the range of competence demanded of attorneys in criminal cases." *Marzullo v. Maryland*, 561 F.2d 540 (4th Cir. 1977). If the court finds that counsel has failed to perform within this range of competence, an additional showing of prejudice must be made to entitle petitioner to relief. *McQueen v. Swenson*, 560 F.2d 959 (8th Cir. 1977). It must be actual prejudice; not merely possible prejudice. *LiPuma v. Commissioner, Dept. of Corrections, State of N.Y.*, 560 F.2d 84 (2nd Cir.), *cert. denied*, 434 U.S. 861 (1977). In the instant case, it would require that counsel's ineffective representation resulted in potentially meritorious objections not being made and that if such objections had been made and granted there was a reasonable possibility petitioner would not have been convicted. In other words, with reasonably competent counsel it was more likely than not that a jury would have reached a different result, that is, acquittal.

Petitioner's claim (1) is similar to a claim asserted in *Boyer v. Patton*, 579 F.2d 284 (3rd Cir. 1978). In *Boyer*, the court held that where the government elicited testimony from a guard regarding a prisoner's silence at the time of his arrest, failure of defendant's counsel to object to that testimony rendered this representation of defendant ineffective entitling defendant to federal habeas relief. It noted, however, that counsel's ineffective performance was prejudicial to the defendant's trial. This Court

finds that although petitioner's counsel was ineffective in not objecting to the state's inquiry of petitioner's post-arrest silence, it was not prejudicial to his trial.

In certain circumstances, ineffective assistance of counsel can be non-prejudicial requiring the affirmance of the [state court's] judgment in spite of such ineffective assistance. *United States v. Crowley,* 529 F.2d 1066 (3rd Cir. 1976), *cert. denied,* 425 U.S. 995 (1977). The record reveals that even if petitioner's counsel had objected to the state's reference to petitioner's post-arrest silence and the objection was sustained, the jury was more likely than not to convict petitioner due to the substantial amount of evidence against him.

The evidence showed that petitioner was in the victim's presence for four hours and was accurately identified by him. (R p 14-30). The car which petitioner used was also identified by his victim. (R p 121). Petitioner was identified in a non-prejudicial line-up (R p 143) and was arrested with a gun in his possession of the caliber used to shoot his victim. When the gun was test fired, it showed that it was the gun used to shoot his victim. (R p 100, 86-87, 155).

Counsel's failure to object to the State's inquiry into petitioner's post-arrest silence was not prejudicial because the jury received evidence independent of this error sufficient to convict petitioner. Therefore, he is not entitled to federal habeas relief.

2. *Improper comment at line-up.*

Petitioner further claims that he was denied effective assistance of counsel because his trial attorney failed to

object to Sergeant Burns' testimony that petitioner's attorney stated that the line-up was a "good" one, and failed to raise such error on appeal. Although petitioner contends that his statement violated three fundamental guarantees, he has failed to show how Sergeant Burns' testimony regarding petitioner's attorney's statement at his line-up prejudiced the jury.

Since the record reveals that the line-up procedure was constitutionally adequate, it is difficult to see how his attorney's statement could prejudice his client's case. Sergeant Burns testified that he was present at petitioner's line-up. He stated that there were six men in the line-up. All six were black males between twenty and twenty-five years of age and at least six feet high. None were below five foot ten inches in height. All were medium build, between one hundred and fifty-five and one hundred and seventy pounds. The petitioner was in that line-up and all wore jail fatigues.

It is clear the line-up was appropriately conducted in accordance with the requirements set forth in *United States v. Wade*, 388 U.S. 218 (1967). *Thompson v. Slayton*, 334 F.Supp. 352 (W.D. Va. 1971). Mr. Cooper's statement that the line-up was a "good" one did not prejudice petitioner's right to a fair trial. Petitioner was therefore not denied effective assistance of counsel.

3. *Evidence of prior criminal record.*

Petitioner finally claims that he was denied effective assistance of counsel because his trial attorney did not object to evidence implying that the petitioner had a prior criminal record. The record reveals that Robert W. At-

kinson, special agent with the U.S. Army Criminal Investigation Division at Fort Bragg, North Carolina, testified that the victim, James DeLay, identified in a "mug book" a picture of petitioner as the individual who robbed him. Petitioner contends the witness' use of the phrase "mug book" impliedly suggested to the jury that he had a prior criminal record and his counsel rendered ineffective assistance by not objecting to such testimony.

Identification of petitioner through testimonial references to "mug book" photographs will be grounds for federal habeas relief only if it had a prejudicial effect upon the triers of fact. *United States ex rel. Durso v. Pate*, 426 F.2d 1083 (7th Cir. 1970), *cert. denied*, 400 U.S. 995 (1971). The record reveals that the "mug book" testimony could not have had but a slight effect on the jury. Atkinson mentioned it several times in his testimony, but it was not pursued on cross-examination. Further, there was no prior conviction attributed to petitioner through Atkinson's use of the phrase.

This Court holds that the reference to the "mug book" in Atkinson's testimony did not prejudice his trial. Because these references did not prejudice his trial, he has not been denied due process due to the inadequacy of counsel for his failure to object to Atkinson's "mug book" testimony. *Tapia v. Rodriguez*, 446 F.2d 410 (10th Cir. 1971). Therefore, this claim merits no federal habeas relief.

ORDER

Based upon the foregoing findings of fact and conclusions of law, IT IS THEREFORE ORDERED THAT PETITIONER'S MOTION IS GRANTED IN PART

AND DENIED IN PART AND THAT THE OCTOBER 28, 1981 ORDER OF THIS COURT IS VACATED IN PART AND RETAINED IN PART; THAT RESPONDENTS' MOTION TO DISMISS IS GRANTED AND PETITIONER'S APPLICATION FOR A WRIT OF HABEAS CORPUS IS DENIED AND HIS CASE DISMISSED.

SO ORDERED. THIS THE 3 DAY OF FEBRUARY, 1982.

AT TRENTON, NORTH CAROLINA.

/s/ John D. Larkins, Jr.
Senior District Judge

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NO. 83-1318

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

SAMUEL P. GARRISON, etc.,
Petitioners,

vs.

GEORGE SMITH ALSTON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court grant certiorari to review the standard of effective assistance of counsel applied by the Fourth Circuit when
   (a) there is no longer a conflict among the federal courts as to the correct standard, and
   (b) trial counsel's performance in this case was prejudicially ineffective under any possible standard?
2. Should this Court grant certiorari to review the Fourth Circuit's conclusion that trial counsel's incompetence was not harmless error when petitioner's challenge to that conclusion raises no substantial question of law warranting consideration by this Court?

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OPINION BELOW

Omitted pursuant to Rule 34.2.

JURISDICTION

Omitted pursuant to Rule 34.2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Omitted pursuant to Rule 34.2.

STATEMENT OF THE CASE

On August 19, 1977, Respondent George Alston ("Mr. Alston") was convicted in the Superior Court of Cumberland County, North Carolina, of assault with intent to kill inflicting serious injury, armed robbery and kidnapping. Two earlier trials on the same charges had resulted in mistrials when juries were unable to reach a verdict. Upon his conviction in the third trial, Mr. Alston was sentenced to concurrent life sentences for kidnapping and armed robbery and a consecutive sentence of twenty years for assault. His direct appeal, handled

by the same court-appointed attorney, was denied by the North Carolina Supreme Court on April 17, 1978.

State remedies on the issues now before this Court were exhausted by application for post-conviction relief filed on March 12, 1979 by new attorneys. That application was denied without hearing by the original trial judge on March 16, 1979; the North Carolina Court of Appeals denied certiorari; and the North Carolina Supreme Court affirmed that denial on June 18, 1979.

Mr. Alston filed this habeas action on January 22, 1981, asserting matters raised in the state court application for post-conviction relief. On February 5, 1982, the Honorable John D. Larkins, United States District Judge for the Eastern District of North Carolina, dismissed Mr. Alston's petition for writ of habeas corpus without hearing. Judge Larkin acknowledged that Mr. Alston's trial counsel had rendered ineffective assistance but held that such ineffectiveness was not prejudicial because the jury "was more likely than not to convict [Mr. Alston]" even if counsel's performance had been adequate.

On November 3, 1983 the United States Court of Appeals for the Fourth Circuit reversed Judge Larkins, agreeing that court-appointed trial counsel's performance was constitutionally defective and further holding that the ineffective assistance of counsel was prejudicial. The Fourth Circuit therefore directed that the writ issue on Mr. Alston's behalf.

STATEMENT OF FACTS

The evidence introduced at Mr. Alston's trial is summarized in the Fourth Circuit's opinion. [Appendix to Petition for Certiorari pp. 2-6].

At trial, Detective Burns, one of the arresting officers, testified on direct examination that, after being advised of his constitutional right to remain silent, Mr. Alston "stood on his constitutional rights." The prosecutor then asked "in other words he didn't say anything to you at that time?" The detective answered, "He started to converse, sir and then he just shut up and said I want my lawyer and we abided by his wishes." On cross-examination, Detective Burns testified that Mr. Alston's exercise of his constitutional right to remain silent was one of the reasons he became the primary suspect.

Detective Burns subsequently testified a third time that Mr. Alston had stood on his constitutional right to remain silent following his arrest.

Detective Burns also testified that Mr. Alston's court-appointed attorney had endorsed the quality of a crucial identification line-up:

> He [trial counsel] said that this was the best one he had ever saw - I don't remember whether he said it was the best one he ever saw but he said it was a very good line-up."

Mr. Alston's court-appointed counsel failed to object to any of the foregoing testimony, to ask for curative instructions or to move for mistrial. Nor did he raise the issues on direct appeal.

SUMMARY OF ARGUMENT

The district court and the court of appeals both correctly held that Mr. Alston's court-appointed trial counsel failed to render effective assistance. The court of appeals correctly concluded that this failure was not harmless error. Contrary to petitioner's argument, there is no longer any conflict among the circuits as to the definition of "effective assistance of counsel." In any event, this would not be an appropriate case to resolve such a conflict because Mr. Alston's attorney was "ineffective" under any definition. Counsel's ineffectiveness was clearly prejudicial to Mr. Alston because (1) evidence concerning his post-arrest silence undermined his essential defense of alibi and (2) the evidence that his attorney vouched for the crucial line-up reinforced one of the key elements of the state's case.

ARGUMENT

I. There Is No Conflict Among The Circuits As To The Definition Of Effective Assistance Of Counsel; And This Would Not Be A Suitable Case For Resolution Of Such A Conflict If It Existed.

Although the district court and the court of appeals agree that Mr. Alston's court-appointed attorney was deficient, petitioner nevertheless argues that a grant of certiorari in this case would give the Court an opportunity to resolve a conflict among the circuits as to the proper definition of "effective assistance of counsel." That argument is without merit.

There is no longer any real conflict among the circuits with respect to the definition of effective assistance of counsel. Following this Court's lead in

McMann v. Richardson, 397 U.S. 759, 771, 25 L.Ed.2d 763, 773, 90 S.Ct. 1441, 1444 (1970), every federal court of appeals has now adopted a "reasonable competence" standard. See, e.g., United States v. Bosch, 584 F.2d 1113, 1120-21 (1st. Cir. 1978) ("reasonably competent assistance"); Trapnell v. United States, 725 F.2d 149, 153 (2d. Cir. 1983) ("reasonably competent assistance"); Moore v. United States, 432 F.2d 730, 737 (3d. Cir. 1970) ("normal competency"); Marzullo v. Maryland, 561 F.2d 540, 543-44 (4th Cir. 1977), cert. denied, 435 U.S. 1011, 98 S.Ct. 1885, 56 L.Ed.2d 394 (1978) ("normal competency"); Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974) ("reasonably effective assistance"); United States ex rel. Williams v. Twomey, 510 F.2d 634, 641 (7th Cir.) cert. denied, 423 U.S. 876, 96 S.Ct. 148, 46 L.Ed.2d 109 (1975) ("minimum standard of professional representation"); United States v. Easter, 539 F.2d 663, 666 (8th Cir. 1976) ("customary skills and diligence" of a "reasonably competent attorney"); Cooper v. Fitzharris, 586 F.2d 1325, 1328 (9th Cir. 1978) (en banc), cert. denied, 440 U.S. 974, 99 S.Ct. 1542, 59 L.Ed.2d 793 (1979) ("reasonably competent and effective" assistance); Dyer v. Crisp, 613 F.2d 275, 278 (10th Cir.) (en banc), cert. denied, 445 U.S. 945, 100 S.Ct. 1342, 63 L.Ed.2d 779 (1980) ("reasonably competent assistance"); Douglas v. Wainwright, 714 F.2d 1532, 1553 (11th Cir. 1983) ("reasonably effective assistance"). In Trapnell v. United States, the Second Circuit became the last of the circuits to abandon the old "farce and mockery" test, thus eliminating the conflict among the circuits upon which petitioner relies. To the extent that some of the circuits have used slightly varying language in stating the "reasonable competence" standard, those differences are ones of semantics rather than substance.

Even if the minor variations reflected a difference in substance, this would not be a suitable case for this Court to clarify the standard. The assistance Mr. Alston received was ineffective under any standard. Whatever might be the outer bounds of the constitutionally mandated range of competence, criminal defense attorneys should at least be expected to know and assert on behalf of their clients those fundamental protections guaranteed criminal defendants by our constitution. See, e.g., Boyer v. Patton, 579 F.2d 284, 288

(3rd. Cir. 1978); People v. Ibarra, 60 Cal.2d 460, 34 Cal. Rptr. 863, 386 P.2d 487 (1963) (Traynor, J.) and cf. Beasley v. United States, 491 F.2d at 695:

> Where the defense is substantially weakened because of the unawareness on the part of defense counsel of a rule of law basic to the case, the accused is not given the effective representation guaranteed him by the Constitution. [quoting Poe v. United States, 233 F.Supp. 173, 178 (D.D.C. 1964), aff'd, 352 F.2d 634 (D.C. Cir. 1965)].

Mr. Alston's court appointed attorney failed to meet this minimum requirement.

In clear violation of this Court's mandate in Doyle v. Ohio, 426 U.S. 610, 49 L.Ed.2d 91, 96 S.Ct. 2240 (1976), evidence of Mr. Alston's post-arrest silence was introduced on not one but three occasions. On one of those occasions the arresting officer specifically testified that Mr. Alston's exercise of his constitutional right was one of four factors which focused police suspicions on him - thus eliminating any doubt that the jury and defense counsel might miss the significance of the improper evidence. As the court of appeals noted, this patently unconstitutional evidence undermined Mr. Alston's central alibi defense. [Appendix to Petition for Certiorari at 9-11]. Because there was no conceivable tactical advantage in letting the evidence in, the failure of Mr. Alston's attorney to object, move to strike, request curative instructions or move for a mistrial must be attributed to ignorance of the fundamental rule of Doyle and its ancestors.

Trial counsel's incompetence was accentuated by his indiscretion in praising the state's crucial line-up and his failure to object to the prosecution's introduction of that praise into evidence. Appointed counsel thus subjected Mr. Alston to a "whip-saw" effect. Evidence that defense counsel approved the critical line-up added weight and credibility to a crucial element of the state's case while, at the same time, improper evidence of his post-arrest silence, which would have been excluded by effective counsel, undermined his primary defense.

In short, this case, unlike those cited by petitioner, is not one in which otherwise effective defense counsel failed to make a "garden variety" or peripheral objection, an objection of questionable validity or significance or

an objection dependent on facts outside the record and possibly unknown to counsel. Mr. Alston's attorney, through apparent ignorance, failed to protect a fundamental constitutional right of the criminally accused; the impropriety of the evidence was evident on its face; and its prejudicial effect went to the heart of Mr. Alston's defense. When this is combined with counsel's endorsement of a key element of the state's case, even the old "farce and mockery" standard is probably satisfied. E.g., People v. Ibarra, 60 Cal.2d at 469-66, 34 Cal. Rptr. at 867, 386 P.2d at 491. A fortiori, Mr. Alston received ineffective assistance under any possible variation of the "reasonable competence" standard now universally accepted by the federal courts.

II. The Fourth Circuit Correctly Concluded That Trial Counsel's Ineffectiveness Was Not Harmless Error; And United States v. Frady, 456 U.S. 152 (1983) Is Not To The Contrary.

Petitioner's secondary argument that the Court of Appeal's determination of prejudice is inconsistent with United States v. Frady, 456 U.S. 152 (1983) also fails to raise a substantial question suitable for consideration by this Court.

As demonstrated above, trial counsel's ineffectiveness in Mr. Alston's case weakened the defense on which he placed primary reliance at trial and reinforced a key element of the prosecution's case. After carefully reviewing the record and applying the standards enunciated by this Court in Chapman v. California, 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967) and United States v. Hasting, ___ U.S. ___, 76 L.Ed.2d 96, 103 S.Ct. ___ (1983), the court of appeals correctly found "reason to fear that the shortcomings of counsel infected the outcome of Alston's third trial . . .." Indeed, prejudice to Mr. Alston's defense was obviously the purpose and effect of the prosecution's intentional introduction of evidence as to his post-arrest silence and his attorney's approval of the critical line-up. Thus, there is ample support for the Fourth Circuit's conclusion that counsel's ineffectiveness did not constitute harmless error.

United States v. Frady is not to the contrary. Assuming, arguendo, that Frady's standard of prejudice is applicable in "ineffective assistance" cases, the decision of the court of appeals was consistent with that standard. In

Frady this court held that a trial court's erroneous instruction on "malice" was not prejudicial for two reasons. First, the erroneous instruction related to a defense upon which Frady did not rely at trial. Second, the jury's conclusion that the killing was premeditated a fortiori precluded the possibility of a finding that the killing resulted from "the heat of passion" (i.e. without malice) regardless of what malice instruction was given. Clearly, neither of these grounds is present in this case. Thus, Frady provides no grounds for questioning the Fourth Circuit's conclusion that Mr. Alston suffered prejudice as a result of his counsel's incompetence.

CONCLUSION

For the reason's set forth above, this is not an appropriate case for review by this Court. The decision by the court of appeals was clearly correct; petitioner has raised no substantial question warranting review by this Court; and the Petition for Writ of Certiorari should therefore be denied.

Respectively submitted this the 16th day of April, 1984.

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CERTIFICATE OF SERVICE

This is to certify that two copies of the foregoing Brief in Opposition to Petition for Certiorari were duly served this date on counsel for the Petitioners by forwarding a copy thereof enclosed in a postage paid envelope deposited in the United States Mail and addressed as follows:

Mr. Rufus L. Edmiston
Mr. Richard N. League
1 West Morgan Street
Post Office Box 629
Raleigh, North Carolina 27602

This the 17th day of April, 1984.

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NO. 83-1318

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

SAMUEL P. GARRISON, etc.,
Petitioners,

vs.

GEORGE SMITH ALSTON,
Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS
AND TO FILE TYPEWRITTEN BRIEF IN OPPOSITION TO
PETITION FOR CERTIORARI

Respondent George Smith Alston, through undersigned counsel, hereby moves pursuant to Rule 46 of the Rules of this Court and 28 United States Code §1915 for an Order permitting him to proceed in this Court in forma pauperis with his opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit filed in this Court by Petitioner on February 1, 1984 and further permitting him to file his Brief in Opposition to Petition for Certiorari in typewritten form.

In support of this Motion, respondent respectfully shows unto the Court that the United States Court of Appeals for the Fourth Circuit appointed the undersigned Michael T. Medford as counsel for respondent under the Criminal Justice Act of 1964, as amended.

Respondent's Brief in Opposition to Petition for Certiorari is being filed with this Motion.

Respectfully submitted this 16th day of April, 1984.

Howard E. Manning

Michael T. Medford

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CERTIFICATE OF SERVICE

This is to certify that two copies of the foregoing Motion for Leave to Proceed In Forma Pauperis and to File Typewritten Brief in Opposition to Petition for Certiorari were duly served this date on counsel for the Petitioners by forwarding a copy thereof enclosed in a postage paid envelope deposited in the United States Mail and addressed as follows:

Mr. Rufus L. Edmiston
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This the 17th day of April, 1984.

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